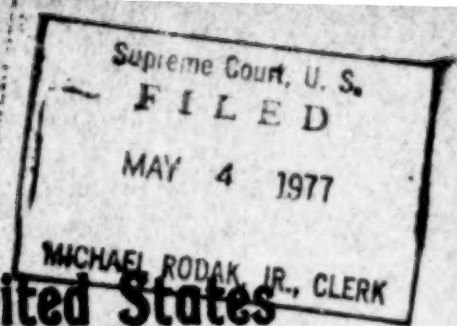


IN THE
Supreme Court of the United States



October Term, 1976.

76-1529
No.

H. N. SPENCER, M.D.,

Petitioner,

v.

HANNA M. AYOUB and MARGARET AYOUB, His Wife,
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE THIRD CIRCUIT AND APPENDIX.**

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IN THE Supreme Court of the United States

OCTOBER TERM, 1976.

No.

H. N. SPENCER, M.D.,

Petitioner,

v.

HANNA M. AYOUB and MARGARET AYOUB, His Wife,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner, H. N. Spencer, M.D., prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit reversing the Judgment of trial court and remanding for further proceeding, and the Order denying petitioner's Petition for Rehearing.

CITATION OF OPINION BELOW.

The Opinion of Court of Appeals, Hanna M. Ayoub and Margaret Ayoub, his wife, Appellants v. H. N. Spencer, M.D., Appellee, has not been officially reported and is set forth in the Appendix at page A1. The Opinion of the District Court, Hanna M. Ayoub and Margaret Ayoub, his wife, Plaintiffs v. Dr. H. N. Spencer, M.D., Defendant, has not yet been officially reported and is set forth in the Appendix at page A14.

JURISDICTION.

The Judgment of the Court of Appeals reversing the Judgment of District Court was entered on February 28, 1977. A Petition for Rehearing filed on March 4, 1977 was denied by Order entered March 28, 1977. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW.

1. Did the Court of Appeals err in reversing on the grounds that the instructions to the jury were inadequate in the application of the law of contributory negligence to the facts of the case and in stating the standard of conduct required for a finding of contributory negligence in the absence of any objection to any such inadequacy in the court below in contravention of the requirements of Rule 51 of the Federal Rules of Civil Procedure?

2. Did the Court of Appeals err in reversing on the ground that the instructions to the jury failed to make clear that the jury must find that respondent's conduct was both negligent and a proximate cause, where the only objection made at the trial did not specify or distinctly state any such grounds in contravention of the requirements of Rule 51 of the Federal Rules of Civil Procedure?

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED.

This case involves the application of Rule 51 of the Federal Rules of Civil Procedure, 28 U. S. C., Rule 51, which provides:

"... No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. . . ."

Rule 51 is set forth in full in the Appendix at page A25.

STATEMENT OF THE CASE.

This is a medical malpractice case which resulted in a jury verdict in favor of the defendant Dr. Spencer, petitioner herein. The plaintiffs' motion for a new trial was denied on January 28, 1976 and plaintiffs appealed, asserting alleged deficiencies in the charge of the trial court. The Court of Appeals reversed the Order of the trial court denying plaintiffs' motion for a new trial, and remanded the cause for further proceedings. Petitioner's Suggestion for a Rehearing in Banc and Petition for Rehearing were denied by the Court of Appeals.

The respondent Hanna M. Ayoub (respondent) was injured in a fall at work and suffered pain in his back in the thoracic area for which he was treated by other doctors and chiropractor for five and a half weeks after which he saw the petitioner, an orthopedist, who examined him, prescribed a brace, and gave him an appointment for a return visit two weeks later. Respondent kept the appointment for the return visit at which the petitioner checked the brace for proper fit and advised respondent not to return to work until further notice.

The only substantial factual dispute was whether or not at this second visit respondent was given an appointment to return for a third visit two weeks later. Petitioner testified that the appointment for a third visit was given and introduced his office records showing the making of the appointment and a notation that the respondent did not keep it. Respondents testified that the appointment was not given. There is no dispute however about the fact that the respondent did not keep that appointment and never came back to see petitioner again. Instead, respondent returned to work and seven months later became partially paralyzed and was operated on without success. Respondents contended at the trial and their expert medical witness testified that respondent's alleged failure to give a follow-up appointment for the third visit constituted malpractice. Petitioner contended that he did give

respondent an appointment for the third visit and that in addition respondent's failure to seek further medical attention for seven months during which his symptoms continued unabated constituted contributory negligence on his part.

The respondent's expert medical witness testified that the only fault to be found with petitioner's treatment was the failure on the occasion of the second visit to make a follow-up appointment and that if such an appointment had been made the petitioner's treatment of respondent was fully in accord with good medical practice. It was undisputed by expert witnesses on both sides that further treatment was not warranted at the time of the second visit.

Respondents asserted in *their brief* on Appeal that the trial Court's charge was error because it inadequately set forth the principles of contributory negligence and failed to adequately relate those principles to the facts and because the charge misled the jury into believing that respondent was barred from recovery if his failure to procure additional medical treatment for the seven months after his last visit contributed to his injury regardless of whether or not that failure was negligent because the charge intertwined the concepts of contributory negligence and proximate cause. (Appellants' Brief, pp. 12-15).

Petitioner argued that the charge was proper, and that the Rule 51 requirement of objections on distinctly stated grounds prevented assignment on appeal of the errors asserted because there was no objection whatever to any failure to charge or any inadequacy of the charge on contributory negligence, or to any failure to relate the law to the facts, or to any failure to require negligence as well as proximate cause before barring respondent on the grounds of contributory negligence. The sole objection which was made was that in charging the jury on contributory negligence the court described it in connection with proximate cause which was misleading and confusing in that an improper standard of proximate cause was used (N. T. 8-47).

Petitioner contended that in the context of this case, in which the respondent had vigorously but unsuccessfully argued below that the petitioner's malpractice need not be a proximate cause of the respondent's injury but only that the malpractice increased the risk of harm, the objection made did not constitute an objection to alleged inadequacy of the charge on contributory negligence or in relating the facts to the law, or a failure to require negligence as well as causation before barring respondent from recovery because of his contributory negligence. Petitioner argued on appeal and in its brief that there was no objection to any such asserted errors and that the objection made did not distinctly state any such grounds as required by Rule 51 and pointed out that the trial judge, in response to the objection which was made, had further instructed the jury on proximate cause without any mention of contributory negligence and without any further objections or suggestions by respondents; and that any error if present was not of such nature as to permit the Appellate Court to reverse the jury verdict under the Appellate Court's prior decisions permitting reversal without a specific objection where the error was found to be so fundamental and so highly prejudicial that failure to consider it would result in a gross miscarriage of justice and where the jury's findings could not be justified on the evidence even under a proper charge.

In their Reply Brief (p. 11) respondents argued that the objection was sufficiently distinctly stated to advise the Court that the jury was led to believe that if there was proximate cause between respondent's failure to return for treatment and his injury he was barred from recovery regardless of whether or not he was negligent, and that in any event the error was fundamental so as to justify reversal without an objection (Reply Brief, p. 7).

The Appellate Court reversed the jury verdict on the ground that "... the charge as a whole inadequately put in issue the alleged contributory negligence of Mr. Ayoub."

(Opinion, p. A5) because the charge failed to explain adequately the application of the law of contributory negligence to the facts of the case (Op. p. A7), failed to make clear that the unreasonableness of respondent's conduct was a prerequisite to a finding of contributory negligence (Op. A6) and failed to make clear that the standard of conduct required of respondent was that of a reasonably prudent person (Op. A7).

Nowhere in its opinion did the Appellate Court quote or even refer to the only objection which was made. It did not discuss or determine whether or not the grounds stated related to any of the issues which were argued or upon which the reversal was founded. The requirement of Rule 51 that an objection be made on grounds distinctly stated was totally ignored and that Rule was neither cited nor referred to. The Appellate Court concluded that the charge on the subject of contributory negligence left the jury without guide or compass in reaching a decision, and constituted fundamental error requiring a reversal, citing *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96, 102-3 (3rd Cir. 1960).

The Appellate Court therefore reversed the jury's verdict in favor of petitioner for supposed inadequacies in the charge to which no objection was taken in the trial court and assumed without discussion that an objection which was made was directed to the deficiencies it found to exist. There was no consideration of the mandate of Rule 51 or circumstances under which that mandate might be ignored.

ARGUMENT

I. The Failure of the Appellate Court to Consider the Mandate of Rule 51 of the Federal Rules of Civil Procedure That Alleged Deficiencies in Instructions May Not Be Assigned as Error Unless Objected to Below on Grounds Distinctly Stated and Its Failure to Consider or Determine the Circumstances Under Which That Mandate May Be Disregarded Present Issues of Great Importance to the Administration of Justice in the Federal Courts Which Have Never Been Considered or Ruled Upon by This Court and to Which the Courts of the Various Circuits Have Applied Differing Principles.

A. This Court Has Never Considered or Ruled Upon the Issues of Whether the Appellate Courts Have an Inherent Power to Ignore the Otherwise Unconditional Requirement of Rule 51 That an Objection on Grounds Distinctly Stated Must Be Made to the Trial Court Before an Alleged Deficiency in Instructions to the Jury May Be Considered as Error or an Appeal Nor, if Such an Inherent Power Does Exist, the Circumstances Under Which That Power May Be Exercised.

The court has never ruled upon the application of effect of Rule 51 in any of its aspects. In *Gibson v. Lockheed Aircraft Service, Inc.*, 350 U. S. 356, 76 S. Ct. 366, 100 L. Ed. 395 (1956) the court had granted certiorari on the issue of whether an objection to the trial court's failure to give a requested instruction complied with Rule 51, but after argument the court found the case there involved to be one which should be reversed in the exercise of its supervisory powers over the lower federal courts and did so, as a result of which the court found it unnecessary to consider any question as to the application of Rule 51. The court has not ruled upon any aspect of the effect or application of Rule 51 since that reversal.

Rule 51 has since been cited in passing by the court only twice; in *Hamling v. United States*, 418 U. S. 87, 133, 94 S. Ct. at 2915, 41 L. Ed. 2d at 629 (1974) the court referred to the Rule in passing in a criminal case with respect to the requirement of an opportunity to object outside the hearing of the jury, and in *Gregg v. Georgia*, 96 S. Ct. at 2934, 49 L. Ed. 2d at 886 (1976), another criminal case, Rule 51 was referred to in passing. Prior to the reversal in the *Gibson* case the court had cited Rule 51 on only one occasion, noting that the party who had stated at the conclusion of the trial court's charge that he had no exceptions could not urge errors in the charge before the court on appeal. *Wead v. Dichmann, Wright & Pugh*, 337 U. S. 801, 69 S. Ct. 1326, 93 L. Ed. 1704 (1949).

Prior to the enactment of Rule 51 in 1938 this court has recognized that appellate courts may notice errors to which no objection has been made where the errors are obvious, or if they seriously affected the fairness, integrity or public reputation of judicial proceedings. *United States v. Atkinson*, 297 U. S. 157, 56 S. Ct. 391, 80 L. Ed. 555 (1936).

But the court has not recognized the existence of any such inherent power, *vis a vis* Rule 51's unqualified requirement that an objection be made with a distinct statement of the grounds for the objection as a prerequisite for assignment of error in appeal.

The circuit courts of appeals state that they have an inherent power to ignore Rule 51 where the error seems to them to be obvious and prejudicial and the result of the trial sufficiently extreme to constitute a gross miscarriage of justice, or unjustifiable under any charge, (*see pp. 14-17 infra*); but this court has never decided or considered the question of whether any such inherent power exists, nor has it considered the criteria for the exercise of that power if it does exist.

This court, similarly, has never considered the issue of whether or not the requirement of a distinct statement of

the grounds for an objection which was made was sufficient to constitute an objection to the particular error assigned on appeal. The Court has, however, stated without citation of Rule 51, that a general exception to a charge is not sufficient and that objections to a charge must be sufficiently specific to bring into focus the precise nature of the alleged error so that the trial court might have an opportunity to give the correct charge. *Palmer v. Hoffman*, 318 U. S. 109, 119, 63 S. Ct. at 483, 87 L. Ed. at 653 (1943).

The issues of whether an appellate court has an inherent power to reverse a trial court's judgment and a jury verdict for an error not objected to at trial as required by Rule 51, and what criteria are to be applied to the exercise of that power, if it is found to exist, and whether the ground stated for an objection was sufficiently distinct to encompass and to direct the trial court's attention to the particular error assigned as such on appeal will therefore be matters of first impression.

B. The Existence of an Inherent Power to Reverse a Jury Verdict and Require a New Trial in the Absence of an Objection Below and the Circumstances, if Any, Under Which Such a Power May Be Exercised, and the Sufficiency of an Objection Made Below to Bring Before the Appellate Court the Particular Error Asserted, Are Matters of Grave Importance to the Efficiency of the Federal Courts and to the Administration of Justice Therein.

Although the requirement that an objection be made and the grounds for it be distinctly stated is procedural, a jury verdict reversed without a specific objection to the particular error deprives the initially successful litigant of his verdict, delays the conclusion of the litigation, and clogs the trial courts with second trials to the same extent as does any reversal. Reversals for errors not specifically objected to below are far less justified than reversals for

errors in instructions misstating the applicable law after a request by a party for a proper charge or an objection to an improper one. By failing to object and to point out the alleged error, the party has deprived the trial court of an opportunity to correct the error, which may have been entirely inadvertent, or to make a considered ruling upon the matter, rightly or wrongly. See 2B BARRON AND HOLTZHOFF (Wright ed.) § 1104, p. 458; 9 FEDERAL PRACTICE AND PROCEDURE, *Wright and Miller*, § 2551, p. 623. If the parties, who are familiar with the facts and the law of the case, did not perceive the alleged error to be of sufficient gravity or substance to warrant a specific objection at the trial, it is not likely that the error would be of such magnitude in its effect upon the result of the trial to compel a reversal under the vague general standards stated by the Appellate Courts as applying to permit reversal despite failure to comply with Rule 51.

The existence of an inherent power to reverse for errors not properly objected to and the circumstances under which that power may be exercised, if it does exist, are issues of ever increasing importance in times of increasing factual and legal complexity in the cases submitted to juries. The "malpractice crisis" has resulted in the trial of an ever increasing number of malpractice cases of complex medical and technical factual issues. The factual complexity of such cases and their number make it ever more important to require an objection directing the court's attention to any alleged error in the instructions to the jury involving the parties' factual contentions, and to require more stringently that requests for charges and specific objections be made to assist the court in properly submitting the factual issues to the jury. An appellate court should not be required to notice and rule upon an alleged error which was not noticed by the parties at the trial and which the trial court was not requested to correct when it had the opportunity to do so without a second trial.

This Court's affirmation of Rule 51 without any exception based on the gravity or the nature of the unobjected to error will not lower the quality of justice administered in the trial courts. This case was tried under Pennsylvania law and the court's diversity jurisdiction, and if it had been tried in the Pennsylvania courts no error which was not properly objected to, no matter how fundamental or gross that error might be, would result in a reversal; *Dilliplaine v. Lehigh Valley Trust Co.*, 457 Pa. 255, 332 A. 2d 114 (1974), even where a constitutional issue is involved. *Weigand v. Weigand*, 337 A. 2d 256 (Pa. 1975). The refusal of the Pennsylvania Courts to permit such reversals has not resulted in any lessening of the quality of the justice administered therein, but it has relieved them of the burden of considering such allegations of error on appeal and of retrying cases for a second time.

Strict enforcement of the requirements of Rule 51 does not lessen the quality of justice administered; on the contrary, it would seem that in the present case resort to such a power is made as a device for granting a new trial where defendant's verdict is justified by the evidence and unassailable on any other ground. Here the Appellate Court first adopted the contention of the respondents' Brief as its statement of the objection which was made: "Appellants' attorney took exception on the ground that the charge inextricably intertwined the issues of contributory negligence with that of proximate cause." (Op. A4). It made no citation of or reference to the actual objection, which was that contributory negligence was discussed "... in connection with whether or not there was proximate cause ..." and "... that an improper standard on proximate cause was used, that it really should be 233 of the Restatement." (N. T. 8-47).

The Appellate Court then found a lack of clarity in the statement of the applicable standard of care because the charge "... did not make clear that the standard of conduct required of plaintiff to avoid contributory negligence was that of a reasonably prudent person under

similar circumstances.” (Op. 7a). The Court did not notice even in passing that the instruction it suggest was in fact given: “Negligence is the failure of a reasonably prudent person to exercise due care under the circumstances. . . . It may also be the doing of something which a reasonably prudent person would not do under the circumstances.” (N. T. 8-12). The Opinion thereupon concluded that the charge complained of failed “. . . to relate the parties’ contentions to the law of contributory negligence. . . .” without recognition of the fact that it was the trial court’s very mention of the petitioner’s factual contention as to contributory negligence which was the only stated ground for the objection.

If the courts should conclude that some errors are of such character as to be outside the reach of Rule 51, it should take this opportunity to delineate the type of errors which are beyond its pale and to proclaim a standard applicable in all of the Circuits.

C. This Case Is an Appropriate One in Which to Consider the Issues Presented Because the Appellate Court Neither Considered Nor Cited Rule 51, and Reversed Both on Grounds of Alleged Errors to Which No Objection Was Made and as to Which the Contention That an Objection Which Was Made Was Not Sufficiently Specific Is Squarely Presented.

The omission of the Appellate Court to cite or consider Rule 51 requires that it at least be admonished to do so in future cases where, as here, the applicability of the Rule to the issues argued before it on appeal was clear and those issues were briefed. The Appellate Court reversed in effect because it found the charge, which it viewed as a whole, to be inadequate. It stated as grounds for a reversal that the charge failed to include a statement of a reasonably prudent man standard of conduct and failed to properly relate the parties’ factual contentions to the applicable law. There was absolutely no objection at trial

to either of the alleged failures; respondents did not even contend on appeal that any such objection existed and neither they nor the Appellate Court cited any; and none exists. The other premise for the finding of inadequacy of the charge as a whole was that it did not make sufficiently clear that unreasonableness of respondent’s conduct was a prerequisite, in addition to causation, to a finding of contributory negligence (Op. A6). Respondents did object to the submission of any issue of contributory negligence to the jury (N. T. 8-39), but that issue was required under the evidence to be submitted and the Appellate Court so held (Op. A5). The only other objection made was, stated in full:

“ . . . in addition to charging the jury on contributory negligence *you brought it in in terms of whether or not there was proximate cause*. In discussing proximate cause, in addition to what I have already stated, it was *in connection with whether or not there was proximate cause that you discussed the question of contributory negligence*, and I really think that is it misleading and confusing. *I feel very strongly that an improper standard on proximate cause was used, and that it really should be 323 of the Restatement.*”

(N. T. 8-47)

(Emphasis added)

It is clear from the context, from the language, and the specific reference to the Rule of § 323 of the *Restatement of Torts II* that respondent’s objection was that, under plaintiff’s theory of *Hamil v. Bashline*, 224 Pa. Super. 407, 307 A. 2d 57 (1973), evidence of an increased risk of harm should be sufficient proof of proximate cause as to petitioner’s conduct but that it would be improper to apply the same “increased risk of harm” proximate cause rule to the respondent’s conduct as to which proof that the conduct was in fact a proximate cause of his injury was required.

The court had given the reasonably prudent man charge at the beginning of its charge (N. T. 8-12). Thereafter it proceeded to charge on the subsequent issue of proximate cause dealing at length with the effect of evidence of increased risk of harm on that issue. The trial court had previously rejected respondent's requests for charge on respondent's version of increased risk of harm.¹ At the conclusion of the first portion of the charge to the jury respondents repeated their objection to the rejection of that theory (N. T. 8-40-44) and then made the objection which is noted above.

Petitioner's brief strenuously argued that this objection did not comply with the requirements of Rule 51 that the grounds be distinctly stated as applied to reversal sought on the ground that unreasonableness of the conduct of respondent was not required by the charge, but the Appellate Court failed to consider the context of the objection in its Opinion or to discuss or decide whether the lack of clarity it found was encompassed within the objection. This aspect of the case therefore squarely presents the issue of the scope of an objection with regard to a particular error and the requirement of Rule 51 that the grounds for that objection be distinctly stated.

D. The Circuit Courts of Appeal Differ Widely in Their Statements of the Standards Which Govern the Inherent Power They Exercise to Make Exceptions to the Applicability of Rule 51 and the Circumstances Under Which They May Exercise That Power.

Reversal for errors in the trial court's instructions to the jury in the absence of an objection are said by the

1. That rejection of respondents' contention was proper is clear from the court's rejection of that very contention upon reconsideration of the *Hamil* case on a subsequent appeal. *Hamil v. Bashline*, 407 A. 2 1366 (Pa. 1966). Respondents dropped this contention on appeal.

various courts to be governed by various different standards and requirements.

The Third Circuit has stated that such reversal is justified only in an extreme situation where it is apparent on the face of the record that the error is fundamental, and so highly prejudicial that failure to consider it would result in a gross miscarriage of justice. *Hoffman v. Sterling Drug Inc.*, 485 F. 2d 132, 139 (3rd Cir. 1973); *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96, 102 (3rd Cir. 1960); *Pritchard v. Liggett & Myers Tobacco Company*, 350 F. 2d 479, 486 (3rd Cir. 1965). A similar standard was applied reversing a verdict in *Frederick P. Wiedersum Assoc. v. Nat Homes Const.*, 542 F. 2d 62, 66 (2nd Cir. 1976) and in affirming the judgment in *Fields v. Chicago R. I. Ry. Co.*, 532 F. 2d 1211, 1214 (8th Cir. 1976) with the addition of a requirement that the result be inconsistent with substantial justice. It has been stated that the principle cannot be applied unless the verdict could not be supported or justified on the evidence even under a properly worded charge. *Appleyard v. Transamerican Press, Inc.*, 539 F. 2d 1026, 1031 (10th Cir. 1976); *Trent v. Atlantic City Electric Co.*, 334 F. 2d 847, 859 (3rd Cir. 1964). The First Circuit and the leading commentator would confine such reversals to the exceptional case where the error has seriously affected the fairness, integrity or public reputation of judicial proceedings, *Morris v. Travisano*, 528 F. 2d 856, 859 (1st Cir. 1976); 9 FEDERAL RULES AND PROCEDURE, *Wright and Miller*, § 2558 at p. 675 (1971). Other verdicts have been affirmed with a simple statement that the error was not fundamental or plain; *Cicinato v. McPheeters*, 542 F. 2d 634, 635-6 (4th Cir. 1976); *Lewis v. Strickland Truck Lines*, 505 F. 2d 164, 166 (6th Cir. 1974); still others were reversed with the same statement. *Ind. Dev. Bd. of Tr. Section, Ala. v. Fuqua Industries*, 523 F. 2d 1226, 1239 (5th Cir. 1976). In *Williams v. City of New York*, 508 F. 2d 356, 362 (2nd Cir. 1974) the court identified plain error with the exceptional case requiring reversal in the interests of justice. In *Mor-*

rissey v. National Maritime Union of America, 544 F. 2d 19, 28 (2nd Cir. 1976) reversal was refused on the ground that the case was not one in which it was apparent on the face of the record that a miscarriage of justice occurred because counsel had not properly protected his client by timely objection.

This Court reversed on the ground of an impropriety in the special interrogatories submitted to the jury which had been objected to, but three justices dissented with a statement of their continued belief that it was the law "... in civil cases in the Federal courts that, barring some extraordinary circumstance, not here present, failure to request a given issue to be submitted to a jury constitutes a waiver of any right to such submission. The least requisite for raising such failure on appeal is noticed to the trial court by way of an objection." *Magneau v. Aetna Freight Lines*, 360 U. S. 273, 283, 79 S. Ct. at 1191, 3 L. Ed. 2d at 1232 (1959). In the *Gibson* case *supra*, the court reversed because it found the reversals to be necessary in the interests of justice and in the exercise of its supervisory powers over the lower courts. In *Weade v. Dichman*, *supra*, the court refused to consider an alleged error because the appellant had taken no exceptions.

The Third Circuit is notable for the variety of its expositions of the standards which it considers applicable. In *McNello v. John B. Kelly, Inc.*, *supra*, the court reversed because it found the charge failed to relate the complicated facts to the law, stating that it would not do so unless the error in the charge was fundamental and highly prejudicial and failure to consider it would result in a gross miscarriage of justice, citing the same statement in *Callwood v. Callwood*, 233 F. 2d 784, 788 (3rd Cir. 1956). In so doing it distinguished *Armit v. Loveland*, 115 F. 2d 308 (3rd Cir. 1940) on the grounds that in that very similar case the element of duty was not so critical an issue and the charge not so deficient.

That court has on occasion simply refused to consider an admitted error because Rule 51 was not complied with.

Greiner v. Volkswagenwerk, 540 F. 2d 85, 94 (3rd Cir. 1976); *Baughman v. Cooper-Jarrett, Inc.*, 530 F. 2d 529, 533 (3rd Cir. 1976); *Wojciechowski v. Long Airdox*, 488 F. 2d 1111 (3rd Cir. 1973). It has affirmed with a simple statement that the error was not fundamental. *Arkwright v. Philadelphia Electric Co.*, 427 F. 2d 1273, 1276 (3rd Cir. 1970); *Kolman v. Jacoby*, 419 F. 2d 395 (3rd Cir. 1969). It has reversed with the same statement with the addition of the statement that there was no gross miscarriage of justice. *Harkins v. Ford Motor Co.*, 437 F. 2d 276, 278 (3rd Cir. 1970). It has stated that the principle is applicable if at all only where the law was insufficiently particularized and related to the evidence in the case. *Herman v. Hess Oil Virgin Island Corp.*, 524 F. 2d 772 (3rd Cir. 1975).

It is submitted that the various statements upon which the appellate courts rely to exercise an inherent power to avoid the requirements of Rule 51 are purely subjective in each of their variously phrased requirements. In substance, they provide a cloak to throw over the reversal of a result which the appellate court did not like. Proper administration of justice in the trial court and on the appellate level requires that Rule 51 be strictly enforced. Strict enforcement will enhance the dispensation of justice at trial by requiring the parties to assist the court in properly instructing the jury.

II. Conclusion.

Rule 51 on its face admits of no exceptions. It should be strictly enforced. Enforcement of the Rule to prevent the necessity for consideration of errors which the trial court had no occasion to correct and to avoid the necessity of retrials is a matter of importance to all of the trial courts, the trial bar and the litigants. This case presents an appropriate opportunity to consider the effect of Rule 51 since it involves both alleged errors to which there was

no objection at all and an alleged error as to which the sufficiency of the objection is presented for decision. The Petition should therefore be granted.

Respectfully submitted,

WILLIAM F. SULLIVAN, JR.,
BARTON L. POST,
POST & SCHELL, P.A.,
Attorneys for Petitioner,
H. N. Spencer, M.D.

Appendix.

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 76-1408

HANNA M. AYOUB and MARGARET AYOUB, His Wife,
Appellants,

v.

H. N. SPENCER, M.D.,

Appellee.

APPEAL FROM FINAL JUDGMENT ENTERED BY THE UNITED
STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENN-
SYLVANIA, AND FROM THE ORDER OF THE LOWER COURT
DENYING PLAINTIFF'S MOTION FOR NEW TRIAL.

Argued December 3, 1976

Before ROSENN, FORMAN and GARTH, *Circuit Judges*

OPINION OF THE COURT

(Filed February 18, 1977)

FORMAN, *Circuit Judge.*

This is an appeal from a denial of a motion for new trial of a medical malpractice action brought by Hanna Ayoub and his wife, Margaret, to recover damages for permanent paraplegia allegedly sustained by Mr. Ayoub as a result of the negligence of Dr. H. N. Spencer, the defendant physician. The complaint of the Ayoubes alleged that

(A1)

they were subjects of a foreign nation¹ and Dr. Spencer was a citizen of Philadelphia, Pennsylvania, thus furnishing diversity jurisdiction. The case went to trial in the United States District Court for the Eastern District of Pennsylvania to a jury, which returned a verdict for Dr. Spencer. The trial Judge subsequently entered a final judgment, after denying the Ayoub's motion for a new trial.

Mr. Ayoub was employer by his brother, Naim Ayoub, as a furniture refinisher, and had fallen on November 5, 1971, while handling a dresser at work. He allegedly injured his back, for later that day he began experiencing pain between his shoulders that radiated bilaterally from his back around to the front of his chest. Mr. Ayoub was unable to return to work and saw three doctors before being referred by an agent of the workmen's compensation carrier to the appellee, Dr. H. N. Spencer, an orthopedic specialist. Dr. Spencer saw Mr. Ayoub and his wife² on December 14, 1971, at which time he conducted a short examination, took X-rays and prescribed a back brace, pain medication and muscle relaxants. Additionally, Dr. Spencer scheduled another appointment for December 27, 1971, during which he performed no examination other than ascertaining if the brace fitted properly. There was sharply conflicting testimony concerning whether Dr. Spencer scheduled another appointment for January 10, 1972 for Mr. Ayoub, and whether he told Mr. Ayoub that he would be able to return to light work on January 15, 1972. It is agreed, however, that Mr. Ayoub never returned to see Dr. Spencer and did go back to work on approximately January 15.

In early August 1972, Mr. Ayoub saw a general practitioner who referred him to a neurosurgeon, Dr. Haft.

1. Later they claimed to be subjects of Jordan.

2. His wife, who spoke and understood English better than her husband, accompanied Mr. Ayoub to defendant's office and assisted with the communication problem.

On August 10, 1972, while driving to see Dr. Haft, Mr. Ayoub became permanently paralyzed.

Appellants, the Ayoub's, raise three issues. First, they contend that the District Judge failed to instruct the jury properly on contributory negligence. Second, they argue that the District Judge erred in his charge on the issue of proper diagnostic testing. Third, they urge that the District Judge erred in permitting defense counsel to attack plaintiffs' credibility on the basis of a document not received in evidence.

At the close of evidence, the trial judge instructed the jury on the issue of contributory negligence as follows:

"Let me read that again: An injury may be said to be proximately caused by an act or a failure to act whenever it appears from the evidence in the case that the act or the omission played a substantial part in bringing about or actually causing the injury and that the injury was either a direct result or a reasonably probable consequence of the act or omission.

"In that respect in a case such as this, because of what I have mentioned to you, the testimony we have heard about this kind of condition and its consequences generally, you should consider the following: In determining whether the acts of the defendant were the proximate cause of the injury of which the plaintiffs complain you may also consider whether the husband-plaintiff, that is, Mr. Ayoub's failure to take subsequent medical care and treatment was a substantial factor in bringing about those injuries. The defendant in this case has raised the issue of what we call contributory negligence. That is, if you should find that what was a cause of this was the plaintiff's own conduct, failure to go get other medical treatment, then you may conclude that he is barred from recovery because his own conduct was a substantial factor in bringing about the injury, and in

Pennsylvania a person who is what we say contributorily negligent is barred from recovery if their conduct was a substantial factor in bringing about the injury." (Tr. 8-22 to 8-23).

* * *

"The second factor if you conclude that is so and Dr. Spencer was negligent is the item I mentioned about contributory negligence. Even though Dr. Spencer was negligent, and even though what he did was a proximate cause of Mr. Ayoub's injury, you may now take up the question as to whether or not Mr. Ayoub himself was contributorily negligent. If you conclude that he contributed to his own injury by the same standard that was a proximate cause, that is a substantial factor, as I defined it to you, then the plaintiff is not entitled to recover and the verdict should be in favor of Dr. Spencer." (Tr. 8-23 to 8-24).

* * *

"The plaintiff will be entitled to recover if you believe under the rules that I have given you he has made out his case in the standards that I have mentioned showing that Dr. Spencer was negligent and that was a proximate cause and also that he has not been contributorily negligent." (Tr. 8-35 to 8-36).

Appellants' attorney took exception on the ground that the charge to the jury inextricably intertwined the issue of contributory negligence with that of proximate cause.

Diversity of citizenship being the sole basis for federal jurisdiction here, Pennsylvania substantive law is applicable. *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96, 99 (3d Cir. 1960). Under Pennsylvania law, Dr. Spencer

had presented sufficient evidence to warrant submission of the issue of contributory negligence to the jury.³

In examining an alleged erroneous instruction to the jury, it is necessary to view the charge as a whole. *Ely v. Reading Company*, 424 F. 2d 758, 760 (3d Cir. 1970). Our function is to determine whether the charge, taken as a whole and viewed in the light of the evidence, fairly and adequately submits the issues in the case to the jury. *James v. Continental Insurance Co.*, 424 F. 2d 1064, 1065 (3d Cir. 1970). Applying this standard here, it is obvious that the charge as a whole inadequately put in issue the alleged contributory negligence of Mr. Ayoub.

In charging the jury that

"if you should find that what was a cause of this was plaintiff's own conduct, failure to go get other medical treatment, then you may conclude that he is barred from recovery because his own conduct was a substantial factor in bringing about the injury, . . ." (Tr. 8-22)

the trial court intertwined the issues of contributory negligence and proximate cause. "It is plan then that this test of 'substantial factor' is a test of proximate causation and only becomes relevant, if at all, after [the] negligence [of Mr. Ayoub] has been shown." *McNello v. John B. Kelly, Inc.*, *supra*, at 101; *Dickerson v. American Sugar Refining Co.*, 211 F. 2d 200, 202 (3d Cir. 1954). See 2 Harper & James, Torts § 18.8 at pp. 1158-1161; Prosser, Torts § 42, p. 244 (4th ed., 1971). See also the explanation in *Simon v. Hudson Coal Co.*, 350 Pa. 82 (1944). In the present case the issue of whether or not Mr. Ayoub's conduct was reasonable was a crucial one. In the charge, the District Judge emphasized and made numerous references to the issue of proximate cause, i.e. whether "Mr. Ayoub's

3. *Dougherty v. Philadelphia National Bank*, 408 Pa. 342 (1962) and cases therein cited; *Brough v. Strathmann Supply Co.*, 358 F. 2d 374 (3d Cir. 1966) and the cases therein cited; *Walsh v. Miehle-Gass-Dexler, Inc.*, 378 F. 2d 409 (3d Cir. 1967).

failure to take subsequent medical care and treatment was a substantial factor in bringing about those injuries.”⁴ But the unreasonableness of Mr. Ayoub’s conduct was a prerequisite to any finding of contributory negligence. This should have been made perfectly clear to the jury. We are convinced that this issue was not properly clarified for the jury and that confusion may have resulted to appellants’ prejudice.

It is true that the court subsequently charged

“you will then come to the key question, whether or not the plaintiff has met his burden of persuasion, proving by a preponderance of the evidence that Dr. Spencer failed to exercise the care of an orthopedic specialist or a reasonable man as I have described it. Similarly you will have to make the same judgment in respect to the defendant’s contentions of contributory negligence.” (Tr. 8-33 to 8-34).

However, a reading of the charge as a whole,⁵ and considering its general effect leads to the conclusion that the jury may have been misled into believing that if Mr. Ayoub’s failure to seek further medical treatment contributed to his injury, then he was barred from recovery without regard for the reasonableness of his conduct. The Supreme Court of Pennsylvania has warned that “[c]ourts must be careful not to confuse or equate contributory negligence with proximate cause.” *Crane v. Neal*, 389 Pa. 329, 332 (1957), *overruled on other grounds*, *McCay v. Phila. Elec. Co.*, 447 Pa. 490 (1972).⁶ Here, these issues were so intertwined in the instructions that a proper understand-

4. Tr. 8-22.

5. Tr. 8-6 to 8-52.

6. Ironically *Crane v. Neal* was overruled because it, too, failed to clarify properly the distinction between contributory negligence and proximate cause. See, *McCay v. Phila. Elec. Co.*, 447 Pa. 490, 495 (1972).

ing of the separate questions for determination was highly unlikely.⁷ See *Smith v. Clark*, 411 Pa. 142 (1963).

Moreover, the court failed to explain adequately to the jury the application of principles of the law of contributory negligence to various possible factual conclusions at which they might arrive. Although the trial judge instructed the jury that it was to find whether Dr. Spencer “failed to exercise the care of an orthopedic specialist or a reasonable man as I have described it. Similarly you will have to make the same judgment in respect to the defendant’s contentions of contributory negligence,” he did not make clear that the standard of conduct required of plaintiff to avoid contributory negligence was that of a reasonably prudent person under similar circumstances.⁸ This failure allowed the jury to employ any standard it might choose; indeed, as explained above, it allowed the jury to find contributory negligence based solely upon proximate cause. See, *Almaraz v. Universal Marine Corp.*, 472 F. 2d 123 (9th Cir. 1972).

The trial court charged on the law of contributory negligence only in the most general and inadequate terms, entangled with the law of proximate causation. While a comprehensive review of the evidence is not generally required, the District Court’s failure, here, to relate the parties’ contentions to the law of contributory negligence left the jury without “guide or compass” to aid it in ra-

7. What the jury ultimately found, of course, is beyond our knowledge. In determining whether erroneous instructions require the grant of a new trial, whether such instructions did or did not bring about the verdict is not crucial. *Malat v. Riddell*, 383 U. S. 569 (1966); *Vaughn v. Philadelphia Trans. Co.*, 417 Pa. 464, 468 (1965). If it appears that such instructions might have been responsible for the verdict, a new trial is mandatory. *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 370 U. S. 19 (1962); *Riesberg v. Pittsburgh & Lake Erie R. R.*, 407 Pa. 434 (1962).

8. See *Tiller v. Atlantic Coast Line R. R.*, 318 U. S. 54, 67 (1942); *Baltimore & Potomac R. R. v. Jones*, 95 U. S. 439 (1877); W. Prosser, *Handbook on the Law of Torts*, 153-68 (3d ed. 1964).

tionally reaching a decision. This constituted fundamental error requiring reversal. *McNello v. John B. Kelly, Inc.*, *supra*, at 102-103.

Since there will be a new trial, it would seem desirable to consider briefly appellants' remaining contentions submitted on this appeal that the District Judge erred in charging on the issue of proper diagnostic testing and in permitting defense counsel to attack appellant's credibility on the basis of a document not received in evidence.

Appellants contend that the District Judge erred in failing to charge their Supplemental Request No. 10.⁹ Actually, the District Judge did not charge Appellants' Request No. 10 as proposed but did charge, in pertinent part, on diagnostic testing:

"I instruct you that if you conclude that the testimony supports the notion that there are a variety of ways of performing these tests that Dr. Spencer is not obliged to perform all of the tests or only half of the tests. It would be up to you to determine if what he did, even though he may not have done all that some other doctor said he should do, whether or not nevertheless what he did under all the circumstances was in keeping with the standard that he should have honored as an orthopedic specialist at that time, . . ." (Tr. 8-17 to 8-18).

9. "In this case there has been presented competent expert testimony regarding the appropriate examinations and tests which should have been employed by a specialist in orthopedic surgery in order to evaluate or properly diagnose the presence or absence of damage to a thoracic intervertebral disc. As you will recall, the expert testimony included the necessity for testing numbness or 'sensory disturbances'. If you find from the evidence in this case that the defendant, Dr. Spencer, suspected or should have suspected a possible thoracic disc injury to Mr. Ayoub and that he failed to properly and adequately test for numbness or 'sensory disturbances' by utilizing the tests or examinations referred to by the several expert physicians who testified in regard thereto, you may find the defendant liable to plaintiffs for the consequences of his failure to conform to the requisite standard of care." (App. 11a)

Elsewhere in the charge the District Judge defined such "standard" as follows:

"A physician who is a specialist in orthopedic surgery is required to possess and to use in the treatment of a patient the skill and knowledge usually possessed by orthopedic surgeons in the same or similar locality giving due regard to the advanced state of the profession at the time of treatment . . ." (Tr. 8-14).

Appellants contend that the court ignored the uncontradicted testimony of defendant's own expert witnesses that various neurological tests should have been performed by Dr. Spencer. Normally, a party is bound by the uncontradicted testimony of his own expert witnesses. *Evans v. Philadelphia Transportation Co.*, 418 Pa. 567 (1965). However, here, a number of witnesses expressed divergent opinions. Thus, it was within the province of the jury to determine which opinions it would believe and which it would discredit. Each expert's testimony tended to qualify the testimony of the preceding experts.

It was the jury's role to decide whether each expert's opinion was modified by the qualifications placed thereon by the other experts. *Slater v. Erie Lackawanna Ry.*, 300 F. Supp. 1, 3 (W. D. Pa. 1969), *aff'd per curiam*, 411 F. 2d 1015 (3d Cir. 1969). The District Judge's charge informed the jury that if it found the expert testimony on diagnostic testing to be contradictory, the jury was to decide whether defendant's conduct "was in keeping with the standard that he should have honored as an orthopedic specialist at that time . . ." Taken in conjunction with the definition of standard to which the District Judge referred as above set forth, the charge cannot be said to be erroneous.

Finally, appellants assert that the court erred in allowing defense counsel to attack appellants' credibility during his closing argument based on Jefferson Hospital

records which were not in evidence.¹⁰ Appellants argue that defense counsel's reference to the hospital records was improper and that the District Judge's comments were not adequate to cure the error.

During his closing speech to the jury, appellee's counsel argued that Mr. Ayoub's trial testimony was inconsistent with his medical history as recorded in Lankenau Hospital and Jefferson Hospital. The Lankenau records, which had been introduced into evidence had been entered by Dr. Richter, a witness for Mr. Ayoub. The Jefferson Hospital records were never introduced into evidence.

Dr. Richter testified that when a patient is referred from Lankenau Hospital to Jefferson Hospital, a copy of his entire chart is generally transmitted along with the patient. He stated, "[t]his is so the continuity care is not lost and it is a useful thing, but I am certain part of the history would have been gotten from me and some of it gotten directly from Mr. Ayoub. I don't know." (Tr. 3-114).

10. During defense counsel's closing argument to the jury, the following colloquy took place:

"MR. POST [Defense Counsel]: * * * I just ask you to use as Mr. Litvin [Plaintiffs Counsel] said your own common sense. He goes to another hospital. Does that hospital pick up the history from the previous hospital? Maybe they do. Look at that history in Jefferson Hospital. See if it is a word for word history from Lankenau.

"MR. LITVIN: Your Honor, I must object. Neither Mr. Post nor I have put those Jefferson Hospital records into evidence to my knowledge.

* * *

"THE COURT: There was testimony about what they said and the jury will have to recall the testimony about that. I show the Lankenau Hospital record, not the Jefferson.

"MR. LITVIN: Your Honor, there was testimony by Dr. Richter, I believe, as to how those things are put together, but there was no testimony as to what was or was not in the various Jefferson records.

"THE COURT: I think he did speak to the history being somewhat similar and his giving a guess maybe it was carried over. The jury will recall that testimony." (Tr. 7-121 to 7-122).

Appellants contend that Dr. Richter's testimony was not concerned with the content of the Jefferson medical history and therefore defense counsel's reference to the contents of the history constituted error. Indeed, Dr. Richter had never even seen the Jefferson chart on Mr. Ayoub. His testimony in this regard was directed entirely toward a general practice of Jefferson Hospital in obtaining their medical histories as taken at Lankenau Hospital.

The remarks of counsel were required to be confined to the evidence admitted in the case and reasonable inferences drawn therefrom. *Watn v. Penn. R. R. Co.*, 255 F. 2d 854 (3d Cir. 1958); *Robinson v. Penn. R. R. Co.*, 214 F. 2d 798 (3d Cir. 1954). Reversible error is committed when counsel's closing argument to the jury introduces extraneous matter which has a reasonable probability of influencing the verdict. *Rommell-McFerron Co. v. Local U. No. 369, Int. Bro. of Elec. Wkrs.*, 361 F. 2d 658 (6th Cir. 1966); *Twachtman v. Connelly*, 106 F. 2d 501 (6th Cir. 1939).

To the extent defense counsel, here, implied that the Jefferson Hospital history was based on a second, independent contradictory statement by Mr. Ayoub, his remarks were improper and were not justified by the record. Furthermore, the District Judge's comments¹¹ were not sufficient to mitigate the prejudicial effect which may have resulted. The jury should have been instructed at least to disregard counsel's reference to the absent Jefferson Hospital records; not merely to "recall the testimony about that."

For the reasons stated above, the District Court's order denying plaintiffs' Motion for New Trial is reversed and the case will be remanded to the District Court for further proceedings consistent with this opinion.

11. See footnote 10, *supra*.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—
No. 76-1408
—

HANNA M. AYOUB and MARGARET AYOUB, his wife,
Appellants

v.

DR. H. N. SPENCER, M.D.

—
(D. C. Civil Action No. 73-2833)
—

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—
Present: ROSENN, FORMAN and GARTH, *Circuit Judges*
—

JUDGMENT.

—
This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on December 3, 1976.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed on January 28, 1976, be, and the same is hereby reversed and the cause is remanded to the District Court for further proceedings consistent with the opinion of this Court. Costs taxed against the appellee.

ATTEST:

M. ELIZABETH FERGUSON
Chief Deputy Clerk

February 18, 1977

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

—
No. 76-1408
—

HANNA M. AYOUB and MARGARET AYOUB, his wife,
Appellants

v.

H. N. SPENCER, M.D.

—
SUR PETITION FOR REHEARING.
—

Present: SEITZ, *Chief Judge*, FORMAN, VAN DUSEN,
ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER,
WEIS, and GARTH, *Circuit Judges*.
—

The petition for rehearing filed by H. N. Spencer, M.D., Appellee, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ MAX ROSENN

Judge

Dated: March 28, 1977

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

—
Civil Action No. 73-2833
—

HANNA M. AYOUB and MARGARET AYOUB, his wife

v.

DR. H. N. SPENCER, M.D.

—
MEMORANDUM AND ORDER.

BECHTLE, J.

January 27, 1976

This medical malpractice action was tried before a jury and a verdict was returned in favor of defendant. The factual background of the case was as follows: On November 5, 1971, plaintiff Hanna Ayoub fell while at work. During the course of the succeeding nine months, plaintiff was treated by several physicians for back pain apparently resulting from his fall. Defendant is an orthopedic specialist, and he examined plaintiff twice in December, 1971. One of the crucial issues at trial was whether, as plaintiffs contended, defendant scheduled no further appointments to examine Hanna Ayoub or, as defendant contended, an appointment was made for January 10, 1972, which plaintiff failed to keep. Exactly seven months after this crucial date, Hanna Ayoub became paralyzed from the waist down. The cause of the paralysis was a ruptured thoracic disc at T-7-8, the area of the back which had been giving plaintiff pain since his fall the previous November. The paralysis of the lower half of Hanna Ayoub's body is total and permanent.

Presently before the Court is plaintiffs' motion for a new trial. In addition to the general interests of justice, plaintiffs contend that there are five specific grounds which

require that a new trial be granted. We will consider plaintiffs' arguments *seriatim*.

The first ground raised by plaintiffs is that the Court's charge to the jury "inextricably intertwined the issue of proximate cause of Dr. Spencer's conduct with the alleged contributory negligence of Mr. Ayoub."¹ We believe that plaintiffs adequately raised this objection at trial [N. T. 8-47] and, therefore, may now properly assign it as error. The Court also believes, however, that an examination of the entire charge shows that the jury was clearly and adequately instructed on the proper method by which to decide the issue of liability. If from the entire charge, read as a whole, it appears to the Court, as it does here, that the jury has been fairly and adequately instructed, then the requirements of the law are satisfied. *Smith v. Pressed Steel Tank Co.*, 66 F. R. D. 429, 433 (E. D. Pa. 1975), *aff'd mem.*, 525 F. 2d 1404 (3d Cir. 1975).

Subsequent to the point in the Court's charge where plaintiffs claim the "intertwining" took place [N. T. 8-22 to 8-23], the Court stated the proper decisional process as follows: "Even though Dr. Spencer was negligent, and even though what he did was a proximate cause of Mr. Ayoub's injury, *you may now take up the question* as to whether or not Mr. Ayoub himself was contributorily negligent." [N. T. 8-23 to 8-24.] (Emphasis added.) Later in the charge, the Court stated: "The plaintiff will be entitled to recover if you believe under the rules that I have given you he has made out his case in the standards that I have mentioned showing that Dr. Spencer was negligent and that was a proximate cause and *also* that he has not been contributorily negligent." [N. T. 8-35 to 8-36.] (Emphasis added.) Finally, in response to various objections by plaintiffs' counsel, the Court again charged the jury on the proximate cause issue. [N. T. 8-51 to 8-52.] There was no mention made of contributory negligence at that time. We do not believe that the instructions were confusing or misleading.

1. Brief in Support of Motion for New Trial, at 4.

The second ground advanced by plaintiffs is that the Court failed in its charge to explain or define for the jury the standard by which it was to determine whether or not Hanna Ayoub was contributorily negligent. While plaintiffs did object to the issue of contributory negligence being submitted to the jury at all [N. T. 8-39 to 8-40], there was never any protest during the trial concerning the way in which the issue was presented in the Court's charge. Thus, on its face, Fed. R. Civ. P. 51 precludes plaintiffs from now seeking a new trial on that ground. However, the Third Circuit has tempered the impact of Rule 51 by holding that when the error is *fundamental*, an unobjected to charge may be attacked on a motion for new trial. *Morley v. Branca*, 456 F. 2d 1252, 1253 (3d Cir. 1972); *accord*, *Stephenson v. College Misericordia*, 376 F. Supp. 1324, 1326 (M. D. Pa. 1974). A fundamental error has been committed if "the court's charge was totally inadequate to provide even the barest legal guideposts to aid the jury in rationally reaching a decision." *McNello v. John B. Kelly, Inc.*, 283 F. 2d 96, 102 (3d Cir. 1960). This Court does not believe that such an error was committed in this case.

The Court's charge explained to the jury that "the plaintiff's claim is based on negligence, that is, that the defendant failed to possess or employ the skill required of him as an orthopedic specialist or that he failed to act as a reasonable man under the circumstances, or both." [N. T. 8-13 to 8-14.] The Court explained the "reasonable man" negligence standard as follows:

In defining negligence it is important to keep in mind that the mere happening of an accident does not without more mean that someone or anyone was negligent. Negligence is the failure of a reasonably prudent person to exercise due care under the circumstances. That's the kind of conduct that would apply to any person, the so-called reasonable person—yourself, myself, in conducting our normal affairs. It may also be the doing of something which a reasonably prudent person would do under the circumstances. [N. T. 8-12.]

This standard was clearly tied to the question of contributory negligence in our instructions. The Court stated:

[Y]ou will have to assess all the evidence and determine what happened and as a result of that you will then come to the key question, whether or not the plaintiff has met his burden of persuasion, proving by a preponderance of the evidence that Dr. Spencer failed to exercise the care of an orthopedic specialist or a reasonable man as I have described it. Similarly you will have to make the same judgment in respect to the defendant's contentions of contributory negligence. [N. T. 8-33 to 8-34.]

Earlier in the charge, the Court stated:

The defendant in this case has raised the issue of what we call contributory negligence. That is, if you should find that what was a cause of this was the plaintiff's own conduct, failure to go get other medical treatment, then you *may* conclude that he is barred from recovery because his own conduct was a substantial factor in bringing about the injury. . . . [N. T. 8-22.] (Emphasis added.)

The Court believes that the issue of Hanna Ayoub's contributory negligence was properly presented to the jury for decision and that a reading of the charge as a whole reveals that fair and adequate instructions were provided to aid the jury in its task.

Plaintiffs' third argument is that the Court's refusal to give three of their requested points for charge was error. [Plaintiffs' Request for Charge 6, 7; Plaintiffs' Supplemental Request for Charge 11.] Claiming Judge Cercone's opinion in *Hamil v. Bashline*, 224 Pa. Super. 407, 307 A. 2d 57 (1973), as supporting authority, the requested points for charge asserted that a jury finding of negligence on the part of Dr. Spencer, coupled with a finding either that this negligence increased the risk of paralysis to Mr. Ayoub or

that the paralysis resulted because of Mr. Ayoub's reliance upon Dr. Spencer's performance of medical services would, without more, establish causation and liability. See *Restatement (Second) of Torts* § 323 (1965).² This is a misreading of *Hamil* and a misstatement of the law in Pennsylvania. *Cohen v. Kalodner*, 236 Pa. Super. 129, 345 A. 2d 235 (1975) (Cercione, J.). Although the Superior Court, in *Hamil v. Bashline*, *supra*, expressly accepted Section 323 of the Restatement (Second) of Torts as the law of Pennsylvania, it also specifically stated how it interpreted that provision:

The defendant is not, under Section 323, liable merely for having increased the risk of death, but the evidence of the increased risk of death is under subsection (a) of that section for the jury's consideration on the factual issue whether the death was caused by defendant's failure to use reasonable care. 224 Pa. Super. at 417, 307 A. 2d at 62.

Plaintiffs still have the burden of proving causation in medical malpractice cases in Pennsylvania. This Court's charge on the issue of causation was as follows:

In deciding whether or not if there was negligence that negligence was a proximate cause of Mr. Ayoub's injury, you may consider together with the other evidence that you will consider in arriving at that determination whether or not the act or the failure to act

2. Section 323 of the Restatement (Second) of Torts provides as follows:

"One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

(a) his failure to exercise such care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking."

by Dr. Spencer increased the risk of harm to Mr. Ayoub or whether the harm was suffered because of Mr. Ayoub's reliance upon the advice and treatment that Dr. Spencer gave him. [N. T. 8-52.]

We believe that this instruction conforms to the law as it now exists in Pennsylvania³ and that there was no error committed in refusing plaintiffs' requested points for charge.

The fourth ground which plaintiffs assert is that it was erroneous to allow defense counsel to make statements during his closing argument based on hospital records

3. The Court notes that, in conformity with the actual language of Section 323, the above-quoted charge employed the disjunctive conjunction "or" when outlining the factors which might be considered by the jury in determining the question of proximate cause. There is some question, however, as to whether the Pennsylvania courts accept this position or require instead that both increased risk of harm *and* reliance be shown in order to obviate the common law necessity for evidence of reasonable medical certainty that the injury was in fact caused by defendant's failure to exercise reasonable care. In *DeJesus v. Liberty Mutual Insurance Co.*, 423 Pa. 198, 223 A. 2d 849, 850 (1966), Section 323 was commented on as follows:

"The import of that section is that negligent performance or nonperformance must increase the risk of harm *and* that there must be reliance by the injured plaintiff upon the defendant's performing the service he has undertaken to render. Appellant's complaint fails to aver or establish either element and sets forth no cause of action." (Emphasis added.)

Despite the verbatim quotation of this passage in *Hamil v. Bashline*, *supra*, 307 A. 2d at 61-62, the Superior Court's opinion also clearly states that:

"Subsections (a) and (b) [of Section 323] permit that causal connection [between the physical harm and defendant's failure to exercise reasonable care] to be proved by evidence that defendant's failure increased the risk of such harm as was suffered by plaintiff *or* by evidence that the harm was suffered because of reliance on the defendant's undertaking." 307 A. 2d at 61 (emphasis added).

Rather than speculate as to how the Pennsylvania courts actually construe this provision, we simply note that even if the disjunctive approach adopted by this Court is not the accepted one, our instruction to the jury eased plaintiffs' burden of proof on the causation issue and thus was not prejudicial.

which were not in evidence. During the trial, as part of his attempt to raise doubts about the credibility of Mr. Ayoub, defense counsel pointed out discrepancies between Mr. Ayoub's testimony at trial concerning the events leading up to his paralysis and the histories contained in the records of Lankenau Hospital and Thomas Jefferson University Hospital, which histories defense counsel alleged had been obtained from Mr. Ayoub. On cross-examination, Dr. Howard A. Richter testified that he had personally taken the handwritten admission history contained in Mr. Ayoub's Lankenau Hospital records and he read the history to the jury at the request of defense counsel. [N. T. 3-81 to 3-86.] When questioned concerning the Jefferson Hospital records, however, Dr. Richter explained to defense counsel that he had "never seen the inpatient record from Jefferson." [N. T. 3-86.] On redirect, Dr. Richter responded to a query from plaintiffs' counsel concerning the Jefferson Hospital record as is set forth in the margin.⁴ While Dr. Richter had not seen the history in the Jefferson Hospital records, it was clearly his position that it must have been at least partially based on the Lankenau Hospital history for which he was responsible.

During defense counsel's closing argument to the jury, the following colloquy took place:

MR. POST [Defense Counsel]: * * * I just ask you to use as Mr. Litvin [Plaintiffs' Counsel] said

4. "Q. Are you able to tell us from your knowledge not only in this case but of how hospitals work generally and specifically Jefferson Hospital, are you able to tell us if they do have a history similar to what you have been asked about, how that came about?

"A. Well, when a patient is referred from Lankenau to the Jefferson rehab hospital, one of the social workers makes a Xerox copy of the entire chart and sends it down to Jefferson with the patient so *they would clearly have my handwritten history* as it was plus all the rest of the records. This is so the continuity care is not lost and it is a useful thing, but *I am certain part of the history would have been gotten from me and some of it gotten directly from Mr. Ayoub.* I don't know." [N. T. 3-114.] (Emphasis added.)

you own common sense. He goes to another hospital. Does that hospital pick up the history from the previous hospital? Maybe they do. Look at that history in Jefferson Hospital. See if it is a word for word history from Lankenau.

MR. LITVIN: Your Honor, I must object. Neither Mr. Post nor I have put those Jefferson Hospital records into evidence to my knowledge.

* * *

THE COURT: There was testimony about what they said and the jury will have to recall the testimony about that. I show the Lankenau Hospital record, not the Jefferson.

MR. LITVIN: Your Honor, there was testimony by Dr. Richter, I believe, as to how those things are put together, but there was no testimony as to what was or was not in the various Jefferson records.

THE COURT: I think he did speak to the history being somewhat similar and his giving a guess maybe it was carried over. The jury will recall that testimony. [N. T. 7-121 to 7-122.]

Plaintiffs' position is that defense counsel's reference to the Jefferson Hospital records was improper and prejudicial and that the Court's comments were not adequate to cure the error. We do not agree. Dr. Richter's testimony set forth in footnote 4 is circumstantial evidence that the history contained in the Jefferson Hospital records was consistent with the Lankenau history. "To the extent that defense counsel's remark to the jury merely suggested that the Jefferson history, as well as the Lankenau history, differed from Mr. Ayoub's trial testimony, we believe that it was sufficiently supported by evidence in the record. However, the further implication in defense counsel's remark that the Jefferson history was based on a second,

independent statement by Mr. Ayoub which contradicted his trial testimony was improper and not justified by the record. The Court's comments on the objection raised by plaintiffs' counsel made clear that the Jefferson Hospital records had not been placed in evidence. Additionally, these comments undercut the unsupported implication of defense counsel's remark by suggesting that the testimony had been that the Jefferson history was based upon the Lankenau record, although leaving it to the jury to recall on its own precisely what that testimony had been. The Court believes that it adequately dispelled any prejudicial effect resulting from defense counsel's remark. However, even if we now believed our comments to have been insufficient, we would not grant a new trial on this ground. The Court does not believe that this brief comment by counsel could have had any lingering prejudicial effect on the jury such as to make the refusal of a new trial "inconsistent with substantial justice." Fed. R. Civ. P. 61; see *Kremser v. Keithan*, 56 F. R. D. 88 (M. D. Pa. 1972).

Plaintiffs' fifth contention is that the Court's instructions to the jury concerning the issue of proper diagnostic testing was erroneous. The pertinent part of the charge stated:

I instruct you that *if you conclude that the testimony supports the notion that there are a variety of ways of performing these tests* that Dr. Spencer is not obliged to perform all of the tests or only half of the tests. *It would be up to you to determine* if what he did, even though he may not have done all that some other doctor said he should do, whether or not nevertheless what he did under all the circumstances was in keeping with the standard that he should have honored as an orthopedic specialist at that time. . . . [N. T. 8-17 to 8-18.] (Emphasis added.)

Plaintiffs contend that the Court's charge instructed the jury that defendant was not obligated to perform various tests which several of defendant's own expert wit-

nesses testified on cross-examination should have been performed. While it is true that a party is bound by the testimony of his own witnesses, this rule applies only where that testimony is not contradicted or impeached by other evidence. *Slater v. Erie Lackawanna Ry.*, 300 F. Supp. 1, 3 (W. D. Pa. 1968), *aff'd per curiam*, 411 F. 2d 1015 (3d Cir. 1969). Expert opinion may be modified with the qualifications placed thereon by another expert. *Slater v. Erie Lackawanna Ry.*, *supra*, 300 F. Supp. at 3. There was a wide range of contradictory opinions expressed by the expert witnesses in this case on the issue of what, if any, diagnostic tests should have been performed by defendant. We find recognition of this fact in plaintiffs' statement that "*almost all of the experts called on behalf of Dr. Spencer agreed that neurological testing was called for considering the symptoms being evidenced by Mr. Ayoub.*"⁵ The Court's instruction was intended to and, we believe, did make clear to the jury that, if it found the expert testimony on diagnostic testing to be contradictory, it was not bound to hold Dr. Spencer to a standard of conduct based on any particular witness' testimony. Rather, it was left to the jury to decide whether defendant's conduct conformed to that standard which the jury found, based on all the evidence, was the proper one for an orthopedic specialist in defendant's position. We find no prejudicial error in this instruction.

The Court has considered all of the grounds alleged by plaintiffs and has determined that there is no basis for awarding a new trial.

An appropriate Order will be entered.

5. Brief in Support of Motion for New Trial, at 12 (emphasis added).

IN THE
UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

—
Civil Action No. 73-2833
—

HANNA M. AYOUB and MARGARET AYOUB, his wife

v.

DR. H. N. SPENCER, M.D.

—
ORDER.
—

AND NOW, TO WIT, this 27th day of January, 1976, It
Is ORDERED that plaintiffs' motion for a new trial is *denied*.

/s/ LOUIS C. BECHTLE, J.

FEDERAL RULES OF CIVIL PROCEDURE.

—
Rule 51.
—

Instructions to Jury: Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.